Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of	IB Docket No. 95-59
	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	45-DSS-MISC-93

JOINT REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Introduction

The entire real estate industry strongly supports the positions taken in our initial comments. We note that before the comment period closed on April 15, 1996, the Commission had received comments from approximately 84 firms and associations connected with the real estate industry, all fundamentally supporting the positions taken by the joint commenters. When comments received after the deadline are included, over 90% of the approximately 135 submissions responding to the March 11, 1996, Report and Order and Further Notice of Proposed Rulemaking (the "FNPRM") were filed by owners and managers of commercial and residential properties. The prospect of the Commission's intervening in the ownership and management of real property is enormous. The Commission should consider the magnitude of the

real estate industry's opposition to any Commission regulatory intrusion into the competitive real estate market.

I. THE PROPOSED RULE IS TOO BROAD BECAUSE CONGRESS DID NOT INTEND FOR THE COMMISSION TO ATTEMPT TO PREEMPT ALL NONGOVERNMENTAL RESTRICTIONS.

The Commission will overstep its legal authority if it preempts all nongovernmental relationships that affect the placement of satellite antennas. Even the satellite industry commenters have not argued that the proposed rule extends to leases and other private rights. The Commission should narrow the proposed rule to prohibit only governmental restrictions that completely prevent the reception of video programming.

A. Section 207 Does Not Apply to Private Contractual Restrictions on the Placement of Satellite Receiving Antennas.

In our initial comments, the joint commenters argued that the proposed rule was too broad because the use of the term "nongovernmental" could be interpreted as including private contractual restrictions. Even the comments filed by the satellite broadcasting industry implicitly support this conclusion. The Satellite Broadcasting and Communications Association of America ("SBCA"), DIRECTV, Inc., and other satellite industry commenters refer to "restrictive covenants or home-owners' association rules," Comments of SBCA at 14. The satellite industry's comments introduce no evidence of any Congressional intent to preempt leases governing the occupancy of multiple dwelling units or to preempt any restrictions imposed by owners of commercial properties. Thus, the satellite industry

commenters have confirmed by their argument that Congress did not intend to preempt such nongovernmental restrictions.

Nevertheless, the language of the proposed rule is so broad that it could be construed as including real property rights and other private contractual arrangements. If the Commission neglects its legal duty and fails to remove this ambiguity, the satellite industry will surely attempt to enforce that interpretation. For example, some commenters have already asked the Commission to expand its preemption of nongovernmental rules on the grounds that it does not reach far enough. These commenters concede that the proposed rule is ambiguous and they fear the rule might be interpreted as permitting some restrictions to remain in effect.

To make our position clear, the real estate industry sees nothing in the legislative history or the text of the statute to justify intrusion into private constitutional rights or contractual obligations. Indeed, we note that Section 207 never uses the broad, general term "nongovernmental" to describe the restrictions that are to be prohibited. The scope of the proposed rule should be limited to those restrictions intended to be prohibited by Congress, and no others.

B. By Restricting a Property Owners' Right To Control the Use of Its Property, the Proposed Rule Effects an Economic Taking.

We noted in our initial comments that the proposed rule would effect a taking by requiring landlords to permit the physical placement of antennas on their property without their

consent. The proposed rule also appears to violate the Fifth Amendment in another way. If property owners cannot control the placement of antennas on their property, it follows that they cannot obtain compensation when such antennas are installed. Currently, property owners can and do lease "roof rights," just as they lease other parts of their property. See Comments of NAA, et al. at 21-23. The proposed rule would apparently treat any attempt to obtain compensation as a regulation to be preempted, thus effecting an economic taking under the Fifth Amendment because of the vitiation of the property owner's economic interest. See Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

C. Prohibiting the Enforcement of Restrictive Covenants Would Also Constitute an Economic Taking.

The statute does not mandate preemption of all nongovernmental restrictions. Without such a mandate, the Commission must avoid any unauthorized preemption. The Commission must reject the satellite industry's arguments that restrictive covenants are preempted. Such a claim puts the Commission immediately at odds with Fifth Amendment precedents, as discussed above. Such covenants grant property rights that significantly affect the value of the property at issue.

Purchasers of condominiums and other residential properties acquire those properties knowing that they are governed by covenants. In many states such covenants are required to be furnished to the purchaser prior to settlement, and, in any event, they are a matter of public record which a routine title

search would reveal. Indeed, the existence of such covenants is often a positive incentive for a purchaser to buy, because they help create and preserve the character of an area. In the process, the existence of covenants and similar restrictions enhances the value of property and they "run with the fee." Thus, a purchaser has a vested economic interest in the covenants, so long as the provisions are themselves constitutional. Preempting such quasi-governmental restrictions will reduce the value of the affected properties, and constitute an economic taking of an interest in real property.

D. Section 207 Only Prohibits Restrictions That Completely Prohibit the Reception of Video Programming.

The most that can be said about Section 207 is that it authorizes the Commission, in its discretion, to adopt rules preempting "regulations" that completely prevent a viewer from receiving the programming in question. As we argued in our initial comments, Congress used the word "impair" to mean "prevent." Therefore, the language of the statute refers only to those restrictions that entirely prevent a person from receiving satellite video programming. The Commission must narrow the scope of the proposed rule by limiting it to restrictions that actually and completely prevent the reception of video programming.

II. THE SATELLITE INDUSTRY HAS FAILED TO DEMONSTRATE THAT NONGOVERNMENTAL RESTRICTIONS PRESENT A SERIOUS PROBLEM.

In an attempt to show the presumed pervasiveness of the alleged problem, SBCA lists some homeowners associations whose

rules restrict the installation or placement of satellite antennas. We note that out of the thousands of homeowners associations in the country, SBCA has listed only 16. This brief list is hardly evidence of an enormous problem that requires the Commission to transform itself into a national Contract and Covenant Review Board. Centralized, one-size-fits-all remediation will gravely injure traditional private property relationships and is not required to fulfill the purposes of the statutes.

III. THE PROPOSED RULE WOULD MAKE IT DIFFICULT OR IMPOSSIBLE FOR BUILDING OPERATORS TO COMPLY WITH SAFETY CODES ESTABLISHED BY INDEPENDENT BODIES FOR PURPOSES UNRELATED TO RESTRICTING ACCESS TO PROGRAMMING.

The FNPRM indicates that the Commission believes nongovernmental restrictions are grounded solely in aesthetic considerations. We again remind the Commission that safety and habitability are the dominant restrictions the proposed rule would preempt. Leases normally require compliance with local safety codes, such as maintenance and installation under a landlord's supervision, specific building code standards for work done by the tenant or resident, and requiring qualified contractors to engage in an activity. Preempting such lease terms would make it difficult -- and in some cases impossible -- for the building operator to comply with fire, electrical, earthquake, hurricane and other safety codes. The safety codes themselves have been developed by responsible, professional organizations to deal with historical, real problems. The

Commission must recognize it does not have the expertise to judge safety and building code issues.

The National Building Code, standard in most jurisdictions, imposes restrictions on the manner in which antennas may be installed. These rules "are essential to ensure the structural integrity of the applicable dish antenna installations." Petition for Reconsideration of the National League of Cities, et al., at Attachment 1 (filed April 17, 1996).

Does the Commission really "presume" that "wind load" criteria on the Kenai peninsula of Alaska or building setback distances from television antenna towers in Florida should be preempted? Every jurisdiction adopts its own rules to address specific local concerns. "In Florida, we are very conscious of the extensive damage inflicted on structures and objects, such as antennae mounted on roofs and walls of buildings and antennae installed on the ground in populated areas, as evidenced in storms like Hurricanes Andrew (1992), Erin and Opal (both 1995)." Petition for Reconsideration of the Florida League of Cities (filed April 16, 1996).

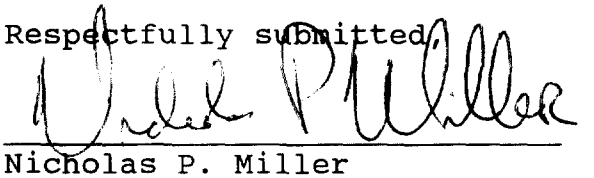
Therefore, the proposed rule is overbroad and should not be adopted. The proposed rule ignores legitimate concerns of property owners and makes it difficult or impossible for building operators to comply.

Conclusion

As the joint commenters urged in our initial comments, the Commission should recognize that it lacks jurisdiction to control

building owners' property rights and leases. The placement of satellite dishes on private property is, and should be, solely a matter between the parties. There are sound and persuasive constitutional, policy and practical reasons why the Commission should not prohibit such nongovernmental requirements. The satellite broadcasting industry stretches the statute for its own economic gains and ignores the broad interests that the Commission must protect. The real estate industry asks the Commission to recognize that there are legitimate legal and safety reasons to not regulate private contracts or impose physical burdens on private property.

Respectfully submitted,



Nicholas P. Miller
William Malone
Matthew C. Ames

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
1225 Nineteenth Street, N.W., # 400
Washington, D.C. 20036-2420
TP: (202) 785-0600
FAX: (202) 785-1234

Attorneys for National Apartment Association, Building Owners and Managers Association International, National Realty Committee, Institute of Real Estate Management, International Council of Shopping Centers, National Multi Housing Council, American Seniors Housing Association and National Association of Real Estate Investment Trusts

OF COUNSEL:

Gerard Lavery Lederer, Esq.
Vice President -- Government
and Industry Affairs
Building Owners and Managers Assn Int'l
1201 New York Ave., N.W.
Suite 300
Washington, DC 20005

Roger Platt, Esq.
Deputy Counsel
National Realty Committee
1420 New York Ave., N.W.
Suite 1100
Washington, D.C. 20005

Edward C. Maeder, Esq.
Counsel to the International
Council of Shopping Centers
400 Madison Street
Suite 2001
Alexandria, VA 22314

Tony M. Edwards, Esquire
General Counsel
National Association of Real
Estate Investment Trusts
1129 20th Street, N.W.
Suite 305
Washington, D.C. 20036

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